

(47.)

59.

Nicholas Somers, Merchant,
Dorothy Goswill, Widow,

Appellant.
Respondent.

Et è contra

*The CASE of Mrs. Goswill Respondent, in the Original
Appeal, and Appellant in the Cross Appeal.*

September 12. 1709.
Will of Thomas Somers.



Thomas Somers late of the City of Exeter, Merchant, deceased (who was the Father of the said Appellant, Nicholas Somers) did in his Life-time carry on a considerable Trade there, as a Fuller, and on or about the 12. September 1709. made his Will, and thereof appointed Roger Prowse, & al^e to be his Executors in Trust for the said Appellant, then an Infant; and when he was of Age then he was to be sole Executor: And the said Thomas Somers directed that Nath. Franklin (who had been his Apprentice) should carry on his Trade with the said Appellant, till he should come to the Age of 25 Years; and that his said Executors should enter into Articles with the said Nath. Franklin on behalf of the said Appellant, and directed them to advance 700 l. out of his Estate, to be the Fund for carrying on the Trade for the equal benefit of the said Appellant and Nath. Franklin. And on December 10th 1710. the said Thomas Somers died, and his Executors proved the Will.

July 10th 1726.
Partnership dissolved.

Altho' no Articles of Copartnership were ever entred into, as directed by the Will, yet nevertheless the said Nath. Franklin managed and carried on the said Trade, during the Minority of the said Appellant for their equal Benefit; and after the said Appellant came to the Age of 25 Years he acted as a Partner with the said Nath. Franklin, on the Terms prescribed by the said Will, till the Partnership was dissolved, viz. on the 10th of July 1726.

At the time of the dissolution of the said Partnership the said Appellant and Nath. Franklin as Partners (both then residing at Exeter) were Indebted unto the Respondent Dorothy Goswill (then also residing at Exeter) in the Sum of 1016 l. 19 s. by a promissory Note, which is in the Words and Figures following, viz.

May 24. 1725. the
Note in Question.

*Borrowed and Received of Mrs. Dorothy Goswill One Thousand and Sixteen Pounds
Nineteen Shillings, which we Promise to pay her, or Order, on Demand. Witness
our Hands in Exon. May 24. 1725.*

Somers and Franklin.

And the Consideration of the said Note was the Value of Eight several Bills of Exchange each for the Summ of 100 l. drawn by the said Respondent on her Correspondents in London, and payable to the said Somers and Franklin, or Order, and advanced to them upon the Credit of the said Partnership. And afterwards when the said Bills became due, the same were respectively paid to the several Persons to whom the said Bills had been endorsed by the said Somers and Franklin.

The said Eight Bills of Exchange were respectively of such Dates, and for such Sums, and drawn upon, and made payable at such Days, and six of them endorsed to such Persons as are herein after mentioned, viz.

The Eight Bills of
Exchange.

April 23. 1720. Bill drawn on Nicholas Cholwell payable to Somers and Franklin } 100 l.	
30 days after date. And endorsed Somers and Franklin to Shales and Smythin for } 100 l.	
D ^o ——— D ^o on Sir John Word, for ———— } 100 l.	
April 30. 1720. D ^o on Nicholas Cholwell payable to Somers and Franklin 30 } 100 l.	
days after date. And endorsed Somers and Franklin to Richard Vivian for } 100 l.	
May 7. 1720. — D ^o — on Sir John Ward ———— } 100 l.	
May 7. 1720. — D ^o — on Nicholas Cholwell payable to Somers and Franklin } 100 l.	
30 days after date. And endorsed Somers and Franklin to Shales and Smythin for } 100 l.	
July 2. 1720. — D ^o on Jonathan and Joseph Bromley payable to D ^o 30 days after } 100 l.	
date. And endorsed Somers and Franklin to Shales and Swythin for } 100 l.	
D ^o 30. — D ^o on Jonathan and Joseph Bromley, payable to D ^o 30 days after } 100 l.	
date. And endorsed Somers and Franklin to William Heathfield ———— } 100 l.	
August 6. 1720. D ^o on Nicholas Cholwell payable to D ^o 30 days after date. And } 100 l.	
endorsed Somers and Franklin to William Drake for ———— } 100 l.	

First Action at Law.

The said Dorothy Goswill not having received any Satisfaction for the Value of the said Eight Bills of Exchange, was advised, and did bring an Action at Common Law against both the said Partners, for the Money due in respect of her advancing the said Eight several Bills of Exchange.

Original Bill exhibited. Octob. 12. 1727.

And thereupon the said Nicholas Somers exhibited a Bill in the High Court of Chancery against the said Respondent and Nath. Franklin, and others; but he the said Nath. Franklin died before he put in any Answer thereto, viz. on or about the 29th of October 1727. and he thereby prayed an Injunction to stay Proceedings at Law, and that the said Note might be delivered up, pretending that the same was obtained by Fraud, without any Consideration, and that the said Nath. Franklin and Dorothy Goswill might respectively Account for all Matters touching the Partnership, and for Relief. ——— And the said Dorothy Goswill having answered the said Original Bill, the said Nicholas Somers three times amended the same, and took two Sets of

March 12 1727. first amended Bill.

August 6. 1728. second amended Bill.

December 21. 1730. third amended Bill.

February 29. 1727. first Set of Executions.

July 30. 1728. second Set of Executions.

March 5. 1727. first Reference.

July 30. 1728. second Reference.

First Answer sworn January 10. 1727.

Exceptions to the Answers of the said Dorothy Goswill, and twice referred the same for Insufficiency; and by reason thereof the Pleadings and Proceedings in the said Cause were unnecessarily drawn into a great length, and the Answers only of the said Dorothy Goswill to the said original and amended Bills took up 17 Skins of Parchment. ——— And yet in and by the first Answer to the original Bill, she the said Dorothy Goswill did set forth, That tho' the said Note did express [borrowed and received] yet the Sum therein mentioned was not upon that Day advanced and lent to him the said Franklin, or to the said Appellant and Franklin in Partnership; and that altho' she did not receive, or had either before or at the respective times of Drawing or Delivering the said

said Bills of Exchange respectively, any Money or other Satisfaction whatsoever, for, or in respect
 of all, or any, or either of the same Bills, or of all, or any part of the Money payable by or on
 all, any, or either of the same Bills, as she positively affirmed she did not, yet she relying upon
 the Characters of the said Somers and Franklin, both as to their Ability and Honesty, did for the
 better accomodating them in the negotiating or applying the said Bills of Exchange, express in
 every of the same Bills *Value received*, and that she never having received one Farthing, either
 Principal or Interest, for the said 800*l.* did apply herself to the said Franklin, and told him she
 expected her Money; whereupon he desired her to be easy, and that he would make up the
 Account with her, and whatever was due for Interest of the said 800*l.* should be turned into
 Principal, and that he the said Franklin and his Partner, the Appellant, would pay her Interest
 for the same 800*l.* and Interest after it should be so made up. And thereupon she and the said
 Franklin did accordingly make up an Account of what was due for Principal and Interest; and
 there appearing thereupon then to be due for Principal and Interest 1016*l.* 19*s.* according to
 their then Calculation: The said Franklin did thereupon, *viz.* on the said 24th May 1725. Sign
 and give her the said promissory Note. That she the said Respondent sent several Letters to the
 Appellant concerning the said Note; and about 20 July 1727 he came to her, when she shewed
 him the said Note, at which he seemed surpris'd; but at last after some Discourse between them
 in relation thereto, said he remembred about two or three of the said Bills, and that he would,
 pay her 100*l.* the next Day, being Friday, and then came and told her he could not pay it as
 that Day, but would pay it the Friday following. That the said 800*l.* charged to be advanced
 for the Plaintiff and his Partner Franklin by the said Bills of Exchange was, as she positively said,
 advanced and lent entirely on the Credit of the Partnership, and not upon the said Franklin's own
 separate or only Credit, nor upon any other Credit whatsoever, except the said Partnership, nor
 did she believe, or ever heard, that one Penny of it was applied to his own separate use; and that
 she doubted not to prove, that it was common for the said Appellant and Franklin in Partnership
 to borrow Money, and believes they have borrowed many 1000*l.* in their Partnership, for se-
 curing whereof sometimes one and sometimes the other gave their Notes in the same manner as
 the said Note given to her, and all Signed Somers and Franklin; and that over and besides the
 several Bills of Exchange before mentioned to be drawn by her in favour of the said Somers and
 Franklin, and for and in respect of which and its Interest, the said Note for 1016*l.* 19*s.* was
 given, she had frequently supplied them in Partnership with divers and sundry Bills of Exchange,
 and lent them several Sums of Money, and sold them Goods, for which, or mozt of which they
 paid her very honestly, and generally within a few Days or Weeks, insomuch that she never kept
 any regular Account with them relating thereto, and therefore could not be more correct therein,
 and that all the Money she received from them, or either of them in Partnership, was, as she
 verily believed in her Conscience, paid to her in or towards discharge only of Moneys lent, or
 Goods sold to them, or for the Value of Bills of Exchange drawn or endorsed by her the said
 Respondent, payable to or in favour of them the said Appellant and Franklin, over and besides
 and exclusive of the aforesaid Eight several Bills which with Interest of the same was the
 Consideration of the said Note for 1016*l.* 19*s.* and that during the said Partnership she never
 had any dealing in the way of Trade with the said Franklin upon his own separate Account, or
 otherwise than in such Partnership as aforesaid, nor to the best of her knowledge and remem-
 brance had or received from him any Money, Goods or Bills of Exchange, or other Matters
 whatsoever, other than what was applied to the Dealings and Accounts between her and the said
 Appellant and Franklin in Partnership.

Second amended Bill
 with fictitious Matter
 and the Plea thereon
 allowed Mar. 7. 1729.

The said Nicholas Somers, by his second amended Bill, having suggested *fictitious Matter*,
 and no wise relating to the Eight Bills of Exchange in Question, *viz.* That Abraham Gos-
 will, deceased, the Respondent's late Husband, had made a Will, and, by a Codicil thereto,
 had devised unto the said Appellant, one fifth of the Residue of his personal Estate: She did
 (as to so much of the said second Amended Bill, as made any Demand, or sought any Ac-
 count from her, for, or in respect of the said Legacy) plead, and did averr, That the said
 Abraham Goswill did not, by any Codicil to his Will, or otherwise, give or bequeath unto the
 said Nicholas Somers one Fifth, or any other Part of the Residue of his Estate, or any other
 Legacy; neither was the Plaintiff named in any Will or Codicil of the said Abraham Gos-
 will; but on the contrary, the said Abraham Goswill made his Will, and annexed a Codicil
 thereto, and gave to the Respondent alone, and not to the Appellant, or any other Person,
 all the Residue of his personal Estate, and appointed her to be his whole Executrix, which
 Will and Codicil she duly proved; and upon arguing the said Plea before the Right Honou-
 rable the Lord High Chancellor of Great Britain, he was pleased to allow the same.

March 12. 1729. In-
 junction dissolved.

Letters of Admini-
 stration to Franklin.
 June 20 1729.

Cross Bill by Dorothy
 Goswill.

Thereupon the Injunction which the said Nicholas Somers had obtained was dissolved.
 The said Nathaniel Franklin, after the dissolution of the Partnership, becoming indebted
 unto the Respondent, and the said Nathaniel Franklin being dead; the Respondent, Goswill,
 did, as principal Creditor, obtain Letters of Administration to him.--- And afterwards, exhibi-
 ted her Cross-Bill against the said Appellant, as surviving Partner; and thereby prayed that
 he might account with her concerning the Partnership Estate and Effects: And that after
 Payment of all Debts belonging to the said Partnership, particularly, the said 1016*l.* 19*s.*
 and making all other Deductions and Allowances; what should be remaining, might be
 equally divided between the Respondent as Administratrix of the said Franklin, and the said
 Appellant, and for Relief.

May 23. 1730. Bill
 of Revivor and Sup-
 plemental Bill.

Afterwards, the said Appellant exhibited a Bill of Revivor, and Supplemental Bill against
 the Respondent, as Administratrix of the said Nathaniel Franklin, for a discovery of Assets,
 and that the same might be applied in Satisfaction of what was pretended to be due to him
 from the said Nathaniel Franklin; but the Appellant having endeavoured, by the said Sup-
 plemental Bill, to compel the said Respondent to answer over again to the very same Mat-
 ters as she had then before answered; she put in a Plea to such Part of the said Bill, and an-
 swered the Residue thereof; and thereupon the said Nicholas Somers amended the said Sup-
 plemental Bill, and waved the said Inquiry.

October 20. 1730.
 Second Plea and An-
 swer to supplemental
 Bill.

That

June 11. 1730. Answer to Cross-Bill. 5 of the 8 Bills in question admitted to be received.

That the said *Nicholas Somers* put in an Answer to the said Cross-Bill, and thereby said that he did believe that the said *Franklin* might receive *Five of the Eight Bills of Exchange*, dated as followeth, viz.

One dated *April 23, 1720.* Drawn on *Nicholas Cholwell* for ———— 100*l.*
And one dated *April 23. 1720.* Drawn on *Sir John Ward*, for ———— 100*l.*
And one dated *May 7. 1720.* Drawn on ———— for ———— 100*l.*
And one dated *May 7. 1720.* Drawn on *Nicholas Cholwell*, for ———— 100*l.*
And one dated *July 2. 1720.* Drawn on *Jonathan*, and *Joseph Bromley*, for ———— 100*l.*

But as to the Bills of the 30th. of *April*, 30th. of *July*, and 6th. of *August*, 1720. he could not find the same were received by the said *Franklin*; but whether they were or not he could not set forth.

Second Action at Law.

That the said Injunction being dissolved as aforesaid, and the said *Dorothy Goswill* being at Liberty to proceed at Law against the said Respondent for 1016*l.* 19*s.* and the Consideration of the said Bills of Exchange being unpaid to her, and she having Proof that all the said Bills were answered and paid by her Correspondents to or for the Use of the said Partnership, according to the Endorsements thereon; she the said *Dorothy Goswill* dropt her first Action, and commenced a new Action at Law, against the said *Nich. Somers*, as surviving Partner; and, among other things, declared in an *Indebitatus Assumpsit*, as for so much Money borrowed and received of her by them; the said Appellant and *Nath. Franklin*, and the said *Nich. Somers*, pleaded thereto the General Issue (*Non Assumpsit*;) and the said Cause coming on to Trial, the said *Nicholas Somers* made Defence thereto by Council, but the Jury gave a Verdict for the said *Dorothy Goswill*, and assessed Damages, (including Interest) to the Sum of 1141*l.* and Judgment was afterwards entred up thereon.

Exon Affizes 1730. a Verdict for 1141*l.*

October 20. 1730. Injunction revived on Terms.

That after the said Trial, (viz.) by an Order of the 20th of *October*, 1730. the said Injunction was revived, and continued till the hearing of the Cause, upon the said Respondent's paying into the Bank one Moiety of the Money recovered by the said Verdict, viz. the Sum of 570*l.* 10*s.* and afterwards the said several Answers in the said Original and Cross Causes were replied unto; and Issue being joined, several Witnesses were examined in each Cause; and Publication being passed, both the said Causes came on to be heard before the Right Honourable the Master of the Rolls, on the 16th of *November*, 1731. And it was then decreed, that a General Account should be taken of the Dealings between the said Appellant and his Partner *Franklin*, and the said Respondent. And his Honour declared, that the Note of the 24th of *May*, 1725. for 1016*l.* 19*s.* ought not to be taken into the Account; and that if any thing upon the said Account should be found due to the said Appellant and his Partner *Franklin* from the Respondent, the said Appellant's Moiety thereof, as also the Moiety of *Franklin*, was to wait in the Hands of the Respondent, the Event of the Account therein after directed of the Partnership Estate; but if upon that Account any thing should be found due from the said Appellant, and his Partner *Franklin*, then the said Appellant was to pay the same to the said Respondent, as the Master should direct; and the Judgment so obtained by the said Respondent on the Note, to stand a Security for the same; and upon Payment thereof, or if nothing should be found to be owing to the said Respondent, then the said Respondent, at the said Appellant's Charge, was to acknowledge Satisfaction on the Record of the Judgment, and to deliver up the Note, and the Injunction was to be continued until after the Report, and the 570*l.* 10*s.* brought into the Bank by the said Appellant, was to be placed out, in purchasing *Sea Annuities*, in the Name and with the Privity of the Accomptant General, he declaring the Trust subject to the Order of the Court: And on the Cross-Bill it was directed, that an Account should be taken between the said Respondent, the Administratrix of *Franklin*, and the said Appellant, of the Partnership, Dealings and Effects come to the Hands of either Party, or of any other Person, for their or either of their Use; and if upon this Account the said Appellant should be found indebted to *Franklin*, he was to pay the same to the said Respondent; but if *Franklin* should be found Debtor to the said Appellant, then the said Respondent was to pay the same out of his Assets; but if the said Respondent should not admit Assets, then she was to account for the Assets of *Franklin* come to her Hands, or to the Hands of any other Person for her Use: And for the better taking the Account, the Parties were to be examined on Interrogatories, and to produce all Books, &c. in their Custody or Power relating thereto upon Oath; and the Master to make the said Respondent all just Allowances.

Novemb. 18. 1732. Decree by Lord Chancellor.

That the said *Dorothy Goswill* apprehending herself to be aggrieved by the said Decree, did appeal therefrom to the Right Honourable the Lord Chancellor, who, upon the hearing the said Causes on the 18th. Day of *November*, 1732. was pleased to Order, that the said Decree should stand with this Variation, *That in taking of the said Account, the said Respondent should be at Liberty to produce the said Note of the 24th Day of May 1725. for 1016*l.* 19*s.* as Evidence before the Master, but not as conclusive Evidence, and that the Consideration of Interest should be reserved on both Sides till after the said Account should be taken.*

Original Appeal by Nich. Somers.

That the said Appellant hath appealed unto your Lordships from such Part of the said last mentioned Decree, as directed that in taking the said Account the said Respondent should be at Liberty to produce the said Note of the 24th of *May*, 1725. for 1016*l.* 19*s.* as Evidence before the Master.

Cross Appeal by Dorothy Goswill.

And the said Respondent apprehending herself to be aggrieved by the said Direction, hath also appealed therefrom unto your Lordships; and the Respondent humbly hopes that your Lordships will see no reason to relieve the Appellant *Nicholas Somers* upon his Appeal; but on the contrary, relieve the now Respondent on her Cross-Appeal, and that for the following (among other) Reasons.

1st.

For that the said Verdict so obtained by the said Respondent *Dorothy Goswill* as aforesaid, stands unimpeached, and the said Appellant *Nicholas Somers* hath never complained thereof, and it was obtained on Defence made by the Appellant; and therefore in taking the said Account, regard ought to have been had to the Money found due thereby, and the Respondent *Dorothy Goswill*, ought not to be deprived of any Benefit of the Evidence, which may arise or result from the said Verdict in the Course of taking the said Account.

2^{dly}.

For that as an open Account is to be taken of the Dealings between the Appellant *Nicholas Somers*, and his Partner *Franklin*, on the one Side, and the Respondent *Dorothy Goswill*, on the other; no Direction or Declaration ought to have been made by the Court, what Degree of Evidence ought to be admitted on either Side, and particularly concerning the said Note

of the 24th of May, 1725. but each Side ought to be left at Liberty to support their Case on either Side from such Evidence as may arise, either from the Note itself, or from any collateral Facts and Circumstances relative thereto; and which may be made use to enforce the same.

3^{dly}. If the said Note is not absolutely to be allowed for the whole Money therein mentioned; and which hath been found by the said Verdict; yet, the Appellant *Nicholas Somers*, hath by his Answer acknowledged, That *five of the said Bills came to the Use of the said Partnership*. And it is proved in the said Cause, That the said Appellant *Nicholas Somers*, in Discourse with the Respondent, since *Franklin's* Death, acknowledged that he knew of two or three of the said Bills, and would pay her the next Day the Sum of 100*l*. in part of the Interest of the said 800*l*. and that there was found in the said Appellant's House among the Papers there, a Paper subscribed *Somers and Franklin*, purporting to be Copies or Memorandums relating to the said Bills of Exchange; but the said Appellant tore the said Paper to pieces, saying, *shall I keep a thing against me in my own House*.

Objection. But it is objected, that in 1725. at the time of, and before signing the said Note, there was a Contract of Marriage between the Respondent and the said *Nath. Franklin*: And that the said Eight Bills being expressed to be for Value receiv'd, the same imported Payment of the Consideration thereof, and that it was usual and customary for Merchants at *Exeter*, to take up Money on *Fridays*, (which is the Market Day there) and to give Bills of Exchange for such Sum the next Day; and that as there were Dealings and Transactions between the said Partners and the Respondent for many Years together, and many Bills of Exchange drawn by her on account of *Somers and Franklin*, and the Value paid to her, she might apply any of those other Bills of Exchange to make up the Consideration of the said Note, as well as the Eight Bills of Exchange in Question: And that three Bills of Exchange drawn by the said Respondent were protested and returned for Non-payment, viz.

One dated *August 8. 1719.* on *Eliha Richardson*, for ———— 170*l*.

A Second dated *October 17. 1719.* on *Anne Drake*, for ———— 100*l*.

A Third dated the same Day on D^r ———— for ———— 50*l*.

Answer. To which it is answered, That if there was any such Contract of Marriage the same was to the loss and prejudice of the said Respondent, she being thereby to lose one half of the said 1016*l*. 19*s*. and that there is no proof of any Fraud in this Case; but on the contrary it appears by the Proofs in the Cause, that the Trade in Partnership between the said Appellant and *Franklin* was carried on in both their Names, and all Bills, Letters, and other things in the way of their Trade were Signed by one in the Name of both, by the Names of *Somers and Franklin*. And that it was frequent for Merchants and Traders in *Exeter* to give Bills of Exchange in which [value received] is generally expressed, and not to have the Money for the Bills till after the Bills are delivered.

And it is in effect found by the said Verdict, that the Value of the said Bills were not paid by the Appellant.

Besides it is clear from the Book of Accounts produced in this Cause by the Appellant, that the said Value was not paid or satisfied, for altho' he had admitted 4 or 5 of the said Bills came to the use of the Partnership, yet there is no Entry of the Payment of the Value of either of the said 8 Bills, and yet there are Entries both before and after the Drawing those Bills, of the Payment of Values for all other Bills of Exchange which passed between the said Respondent and the said Appellant and his Partner; and sometimes these Values were after the Dates of those Bills, and sometimes before.

And as to the three Bills of Exchange which are pretended to be returned, the same were not any part of the eight Bills in Question, each of those being answered and paid by the respective Persons on whom the same were drawn by the said Respondent; and the Respondent actually repaid to the said Appellant and *Franklin* the 170*l*. Bill drawn on *Richardson* by a Bill of Exchange the 14th of *September 1719* on *Sir John Ward* for 80*l*. and by 90*l*. paid in Cash.

And as to the two Bills drawn on *Anne Drake*, it appears by the Proofs in the Cause, that the same were delivered by her to *Franklin* to negotiate at *London* for her use, and to get the Money paid there if possible, the said *Anne Drake* being in suspicious Circumstances; and if the same or any Part thereof could be procured, he the said *Franklin* was to give her Credit for that Money on the Partnership Account. And she never had any Value whatsoever from the said Appellant and *Franklin* in respect thereof.

Wherefore the Respondent, *Dorothy Goswill*, humbly hopeth, that the Original Appeal of the said *Nicholas Somers*, shall be dismissed with Costs; and that your Lordships will be pleased to make such Order for the Relief of the said Respondent *Dorothy Goswill* in the Cross Appeal, as your Lordships in your great Wisdom shall think just.

THO. LUTWYCHE.
N. FAZAKERLEY.

6th Feb^r 1733.

Nicholas Somers Appellant.
Dorothy Goswill Respondent.

Et c^{on}tra

The Respondent Goswill's

CASE.

To be heard at the Bar of the
House of Lords the 6th of Febr.

1733.
So much of the late L^d Chancellor's Order as directed that the Respondent should be at liberty to produce the Note of the 24th of May 1725 as Evidence before the Ma^r, but not conclusive Evidence is Revoked and also such parts of the Ma^r of the Rolls's Deno^r as declared that the s^d Note ought not to be taken into the Auto^r & whereto it is directed that the 570*l*. 10*s*. be bro^u into the Bank and Received and it is ordered that the Ma^r in taking the Auto^r & whereto *Goswill* do state the facts and Circumstances relating to this s^d specially for the Judgm^t of the Court and the said 570*l*. 10*s*. is to be paid out of the Bank to the Appell^t on his giving Security in the Sum to be approved of by the Ma^r to abide the Event of the Auto^r & the rest of the Deno^r is Affirm'd.

